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No. 623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

THE UNITED STATES, *Cross-Petitioner,*

v.

EDWARD P. STAHEL & CO., INC., INTERSTATE HOSIERY MILLS, INC., LIBERTY LACE & NETTING WORKS, a Corporation, COOPER, WELLS & COMPANY, MAY McEWEN KAISER COMPANY, OSCAR HEINEMAN CORPORATION, SAKURA MILLS, INC., C. J. ABEGG and EMIL RINGGER, Doing Business as ABEGG & COMPANY, REAL SILK HOSIERY MILLS, INC., *Cross Respondents.*

On Cross-Petition for Writ of Certiorari to the Court of Claims.

BRIEF FOR EDWARD P. STAHEL & CO., INC., et al. IN OPPOSITION.

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April 4, 1949.

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PRELIMINARY STATEMENT.

On December 31, 1948, the cross-respondents, Edward P. Stahel & Co., Inc., et al., filed a petition for a writ of certiorari to review a judgment of the Court of Claims in No. 490.

On March 3, 1949 the Solicitor General, on behalf of the United States, respondent in No. 490, filed a cross-petition

for a writ of certiorari to review certain parts of the same judgment of the Court of Claims which this Court was asked to review in the petition for a writ of certiorari in No. 490. The cross-petition is conditioned upon the granting of the petition for a writ of certiorari filed in No. 490 by the present cross-respondents. If the petition for certiorari in No. 490 is denied, the cross-petition states that the granting of the cross-petition is not urged.

The cross-petition asks this Court to review the decision of the Court of Claims that: (1) there was a "taking" of cross respondents' raw silk within the meaning of the Fifth Amendment, and (2) that the taking occurred on October 16, 1941. The cross-petition urges that there was no "taking", and that even if there was a "taking" it did not occur on October 16, 1941, but rather on the dates of actual delivery to the Government on specific order.

It is submitted that the question of whether there was a "taking" in the constitutional sense is not an additional issue as it is inherent in the matters presented in the petition for a writ of certiorari in No. 490. It was not discussed extensively therein because the same question was disposed of by the Court of Claims in overruling demurrers filed to the original petitions, and because after the subject had been covered fully by the parties in briefs and in oral argument at trial, the Court of Claims handed down a unanimous decision that there was a "taking".

The only purpose of raising the issue on the date of the "taking" is to reduce the amount of interest and carrying charges which the Court of Claims found the United States was required to pay the claimants. This issue could be presented by the United States in connection with the contention of the petitioners in Case No. 490 that the Court of Claims erred in finding that the date of the taking was October 16, 1941. The entire issue as to date of taking is raised by the cross-respondents' original petition for certiorari in No. 490, a principal issue therein being the pro-

priety of the acceptance of the October 16, 1941 date by the Court of Claims.

The issues raised by the cross-petition are not new and are incidental to and/or inherent in the issues raised by the petition for writ of certiorari in No. 490. The cross-petition is not seriously urged since it is conditional upon the granting or denial of the petition in No. 490.

The cross-petition of the Government, filed simultaneously with its brief in opposition to the petition for certiorari in No. 490, is an attempt to deny the necessity for review by this Court and, at the same time, to establish a defensive status in the cross-respondents. Under such circumstances there is no provision under the rules of this Court permitting the filing of a cross-petition.

The certified copy of the record in No. 490 includes the portions of the record upon which cross-respondents in their brief in opposition to the cross-petition for a writ of certiorari rely.

OPINION BELOW.

The opinion of the Court of Claims (R. 97 in case No. 490) is reported at 78 F. Supp. 200.

JURISDICTION.

The judgment of the Court of Claims was entered on June 28, 1948 (R. 109). Motions for a new trial were overruled on October 4, 1948 (R. 110). A petition for a writ of certiorari was filed on December 31, 1948. A cross-petition for a writ of certiorari was filed on March 3, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED.

I. Was there a "taking" of cross-respondents' raw silk for public use within the meaning of the Fifth Amendment?

II. If there was a "taking", was the date of the "taking" October 16, 1941?

III. Was there a "taking" of the raw silk of two of the cross-respondents which was delivered on D. S. C. Silk No. 1 form of order after October 16, 1941?

STATUTES, REGULATIONS AND ORDERS INVOLVED.

The pertinent portion of the Fifth Amendment to the Constitution of the United States is as follows:

> ". . . nor shall private property be taken for public use, without just compensation."

Section 2 of the Act of June 28, 1940 (54 Stat. 676) as amended by the Act of May 31, 1941 (55 Stat. 236) is set out in Appendix A at page 13 of the petition for writ of certiorari in No. 490.

Executive Order No. 8734 (6 F. R. 1917), issued on April 11, 1941, is set out in Appendix B at page 14 of the petition for writ of certiorari in No. 490.

General Preference Order M-22 (6 F. R. 3731) issued by the Office of Production Management on July 26, 1941, is set out in Finding 9, R. 51, in No. 490.

Amendment of October 16, 1941 to General Preference Order M-22 (6 F. R. 5290) is set out in Finding 14, R. 58, in No. 490.

Price Schedule No. 14 (6 F. R. 3892) issued by the Office of Price Administration and Civilian Supply on August 2, 1941 is set out in Finding 12, R. 53-56, in No. 490.

STATEMENT.

On July 26, 1941, the cross-respondents were the owners of raw silk which they allege was taken by the United States for public use.

Prior to July 1941 the United States had considered creating a stockpile of raw silk. It entered into an agreement for the purchase of 50,000 bales at certain specified prices, but because of the rise in the market price of silk

beginning on July 21, 1941 it withdrew its offer to purchase on July 24, 1941 (R. 69, 70).

Prior to July 1941 the United States, as part of its defense program, had created the Office of Production Management, with authority to function with respect to assuring adequate supplies of materials needed for defense, and the Office of Price Administration and Civilian Supply, with power to determine maximum prices and with power in the price filed coordinate with that of the Office of Production Management in the field of industrial organization. As of July 26, 1941 a joint Committee of both offices existed for the purpose of coordinating policies with respect to vital commodities, including silk (R. 52).

On July 26, 1941 the President, by Executive Order No. 8832, terminated all commercial relations in raw silk with Japan (R. 50); the Office of Production Management issued General Preference Order M-22 which prohibited the delivery or acceptance of raw silk without the specific authorization of the Director of Priorities (R. 51); trading in raw silk on the Commodity Exchange was suspended at the request of the Administrator of the Office of Price Administration and Civilian Supply (R. 52); and the Price Administrator announced that within a few days his office would fix a price ceiling on raw silk at the level prevailing in the market on July 21, 1941 (R. 52). On August 2, 1941 Price Schedule No. 14 was issued which established maximum prices on raw silk (R. 53-56). The enforcement clause of this price-fixing order threatened public censorship for those who failed to comply with the terms of the order (R. 54). The maximum prices were vigorously protested by members of the silk industry but the price-fixing agency refused to make any change in the prices (R. 71, 72).

On October 16, 1941 General Preference Order M-22 was amended to *require* acceptance of orders given a preference rating of A-10, including any order for raw silk placed by the Defense Supplies Corporation (R. 60). All of the raw silk involved in this proceeding was delivered to the Defense

Supplies Corporation after the October 16, 1941 order was promulgated which required the owners to sell their silk, upon request, to Government contractors for parachutes, or to the Defense Supplies Corporation, and forbade owners to use their silk unless specifically authorized by the Director of Priorities (R. 101). With the exception of 120 bales (R. 80, 89), all of the raw silk of cross-respondents was delivered on D. S. C. Silk No. 3 form which expressly stated that acceptance of the order was mandatory (R. 66).

After July 25, 1941, and continuing until after the termination of the war, raw silk was purchased and sold only in accordance with and for the uses prescribed by Government regulations (R. 52). By February 18, 1941 all stocks of silk in the country had been acquired by the United States Government or were in the hands of Government contractors. For this reason Price Schedule No. 14, which had established the ceiling price on raw silk, was revoked and was never reissued (R. 62).

For a more complete statement reference is made to the facts set forth in Petition for a Writ of Certiorari, pages 3-10, in No. 490.

SUMMARY OF ARGUMENT.

The Court of Claims unanimously and correctly found that there was a "taking" by the United States of cross-respondents' raw silk within the meaning of the Fifth Amendment requiring the payment of just compensation. The acts of the United States in their entirety were an appropriation of cross-respondents' property and constituted as a matter of law a "taking" for public use.

The Court of Claims also unanimously held that the "taking" occurred on October 16, 1941. The cross-respondents have taken the position that the date of the "taking" was July 26, 1941. In any event, the "taking" did not occur later than October 16, 1941 when General Preference Order M-22 was amended so as to require the owners of silk to sell their property to the Government or its designee for Government use.

As found by the Court of Claims, there was a "taking" of the raw silk of two of the cross-respondents who delivered their silk on D. S. C. Silk No. 1 form after October 16, 1941.

ARGUMENT.

I. There Was a "Taking" of Cross-Respondents' Raw Silk Within the Meaning of the Fifth Amendment.

Since the filing of the original petitions in the fall of 1945, the United States has contended that the restrictions and regulations placed on cross-respondents, raw silk did not constitute a "taking", but were valid exercises of its sovereign powers with no resulting liability for just compensation. The United States demurred to the petitions and presented its position in its demurrer brief and in oral argument on the demurrer before the Court of Claims. The Court overruled the demurrers on November 7, 1945 (R. 41). In Defendant's Brief, filed March 1, 1948, the United States again advanced its contentions and subsequently argued its position at the trial of the case. The Court of Claims refused to accede to the argument of the United States and unanimously found that there had been a "taking" of cross-respondents' raw silk for public use with the attendant liability for the payment of just compensation. The same contention that there was no "taking" is the primary issue in the present Cross-petition for Writ of Certiorari.

1. On or before July 26, 1941 the United States knew that raw silk would be needed in carrying out its defense program and planned to use the available stocks of raw silk for military purposes.

After the declaration of war in Europe in 1939, the United States entered upon a defense program. Knowing that silk was the basic material needed for the manufacture of parachutes and powder bags, several months prior to July 1941 it considered the advisability of creating a stockpile of

this vital commodity. Negotiations were entered into with one of the leading silk dealers for the purchase of 50,000 bales of raw silk by Defense Supplies Corporation, an agency of the United States. The terms of purchase were agreed to and confirmed in writing on July 10, 1941. Before the purchase was consummated the market price of silk started to rise and increased above the level of the prices initially agreed upon for the silk. The purchase agreement was thereupon revised. When the Government found that it could not purchase the silk in the market for the price it had offered to pay, as late as July 24, 1941 it abandoned its plan to purchase as an ordinary trader in a market open for commercial transactions. It did not, however, abandon its plan to acquire the silk. A few days later, by governmental action, all raw silk was frozen, trading was suspended and a ceiling price fixed. The United States was no longer restricted in the amount of silk it could obtain or subjected to market prices. It had eliminated all competition. It could and did get all stocks of silk for its own use at its own price. As Donald Nelson, Director of Purchases, Office of Production Management, stated in a press release on August 7, 1941:

> "There was only one sensible thing to do and we did it. While there was still time, we made certain that our Army and Navy would have all the silk they need." (Office of Emergency Management, release PM 886).

It must be conceded that the Government formulated a defense program because it foresaw that we might become involved in the European war. In furtherance of its defense program it was necessary that the Government have an adequate supply of materials necessary for defense purposes. On January 7, 1941 the Office of Production Management (OPM) was established by Executive Order No. 8629 and given allocation and priority authority. On April 11, 1941, Executive Order No. 8734 established the Office of Price Administration and Civilian Supply (OPACS) with

authority in the price field to work with the Office of Production Management, and also set up a Price Administration Committee with the Administrator of the OPACS as Chairman and the Director General and Associate Director General of OPM as members of the Committee. The purpose of this Committee was to coordinate prices with respect to vital commodities including silk (R. 52). Both the OPACS and the OPM knew the importance of silk to the war effort and were cognizant of the advantage to the Government of a market controlled through allocation and price fixing mediums. The United States contends that there was no coordination between these two Government departments with respect to the policy to be followed and the actions taken in acquiring raw silk for military needs. We submit that such a contention is not plausible. To assume that the two departments did not coordinate would be counter to the presumption that attaches to governmental action and would not be in accordance with the idea of efficient and coherent action of our Government in times of emergency.

In support of our position that the Government had a plan to obtain the raw silk consideration should be given to the steps taken by the OPM and the OPACS.

The Price Fixing Division of OPACS had been watching the movement in the market prices of silk, but while normal relations existed with Japan it felt that the establishment of a ceiling price would endanger the country's supply of silk (R. 187). When the President, by Executive Order No. 8832, terminated commercial relations with Japan on July 26, 1941, the Government, through its priority and price control agencies, the OPM and the OPACS, diverted all stocks of raw silk from civilian use and acquired it for its own use at an advantageous price. As stated, on July 24th it had cut short its agreements for normal purchases.

On July 26, 1941, the two departments acted almost simultaneously. OPM issued General Preference Order M-22 prohibiting the use or delivery of raw silk without the

authorization of the Director of Priorities. All raw silk was frozen under this order and could not be consumed or delivered. OPACS caused the suspension of trading in silk on the Commodity Exchange and announced that within a few days a ceiling price would be imposed at approximately the market price on July 21, 1941 (R. 51, 52, 53). The determination to control the price of silk was made in order that the cost to the Government of its end products, parachutes and powder bags, could be kept low (R. 190).

On August 2, 1941, OPACS issued Price Schedule No. 14 and set a ceiling price of $3.08 per pound on the standard grade of raw silk, which price was approximately fifty cents below the market price on July 25, 1941, the last day silk was traded in. All raw silk in this country on July 26, 1941 was thereafter acquired for Government use at the ceiling price. None of it was sold for civilian consumption.

The priority order of July 26, 1941 was subsequently amended. The amendment of August 2, 1941 forbade the processing of any raw silk unless specifically authorized by the Director of Priorities (R. 53). That of August 12, 1941 authorized delivery of raw silk to or pursuant to the instructions of the Defense Supplies Corporation without further authorization (R. 58). The amendment of October 16, 1941 expressly *required* delivery of silk on orders having a preference rating of A-10, including orders placed by Defense Supplies Corporation (R. 58). Further amendments were made on October 28, 1941 and February 10, 1942 (R. 60, 61).

On February 18, 1942, the OPA issued an order revoking Price Schedule No. 14 and it was never reissued because there was no silk left in the hands of private owners. It had all be requisitioned (R. 191).

The refusal of the United States to pay the market price for silk which it had contracted to purchase, the presumption of regularity in the functioning of Government departments established to function with respect to commodities needed for defense purposes, and the sequence of actions

taken by the OPM and the OPACS clearly lead to the conclusion that the Government had a plan and purpose to divert all available silk from civilian use and appropriate it for its own use and benefit in fulfillment of military needs. The Office of Production Management admitted such a plan. A press release, PM 1291, issued October 2, 1941 by that office states:

> "OPM has no program to import more silk at this time and knows of no movement to bring more in. Any importation of silk in the future will depend on a number of factors, none of which can be determined at this time. *Meanwhile, OPM is proceeding with the original plan to use the stocks of frozen silk for defense purposes.* . . . All raw silk was frozen under Order M-22, as of July 26, 1941, and all such silk is still frozen under this order." (Italics supplied)

2. General Preference Order M-22 was not a regulatory order in the public interest but was in effect a requisitioning order.

a. *General Preference Order was not an exercise of the power of allocation for the public welfare.*

In furtherance of the defense program in a period of national emergency, Congress on May 31, 1941 (55 Stat. 236) amended section 2 of the Act of June 28, 1940 (54 Stat. 676). The Act of May 31, 1941 gave the President authority to *allocate* material needed for defense upon such conditions and to such an extent as he might deem necessary.

When the United States found that it was inexpedient to create a stockpile of raw silk at the prevailing market prices, it took the first step to effect the acquisition of silk for its own use by freezing the entire supply under General Preference Order M-22 issued by the OPM on July 26, 1941. This order prohibited delivery or processing of raw silk without the specific authorization of the Director of Priorities and its purpose was stated to be, "To Conserve the Supply and Direct the Distribution of Silk." The order

was purportedly issued pursuant to authority conferred under the Act of June 28, 1940 as amended by the Act of May 31, 1941, referred to in the preceding paragraph.

This priority order of July 26, 1941 was not like other priority orders, issued under the authority of the same statute, which permitted critical materials to be *allocated equitably* among essential users for civilian consumption. The Government, under the guise of a priority regulation, took control of all of the raw silk for the purpose of acquiring it for its own use. It never intended that any of the silk was to be made available for civilian use.

General Preference Order M-22 was not a regulation for the *allocation* of raw silk within the meaning of that term or within the intendment of the statute which authorized allocation of materials needed for the national defense. The purpose of *allocation* is well stated in *Steuart & Bro., Inc.* v. *Bowles*, 332 U. S. 398, 404, 88 L. ed. 1350, 64 S. Ct. 1007, where Mr. Justice Douglas says:

> "The problem of the scarcity of materials is often acute and critical in a great war effort such as the present one. Whether the difficulty be transportation or production, there is apt to be an insufficient supply to meet *civilian needs* after military and industrial requirements have been satisfied. Thus without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. *Allocation* or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. The burdens are thus shared equally and limited supplies are utilized for the benefit of the greater number." (Italics supplied.)

The concept of allocation is an equitable distribution of a scarce material to meet civilian needs. It is not the freezing of the entire supply of a commodity with the purpose of acquiring it *in toto* for Government use. There can be no *allocation* of an *entirety*.

Under the order of July 26, 1941, raw silk was frozen not in anticipation of subsequent allocation of silk partly to civilian use, but in anticipation of subsequent appropriation by the Government for the public use. There is a difference between a regulation allocating materials among civilian consumers or diverting deliveries of scarce commodities from one person to another by the Government in the exercise of its sovereign power, and a regulation of deliveries of an entire supply of a commodity for consumption by the Government. An order which allocates a commodity among dealers and consumers or diverts it to *others* has been considered to be a regulation. But an order which restricts the use of private property and subjects it to 100 per cent diversion to the Government for public use is a "taking".

The Courts have recognized the distinction between a regulation for the public welfare and a "taking" of private property. In *William C. Atwater & Company* v. *United States,* 275 U. S. 188, 191, 72 L. ed. 229, 48 S. Ct. 90, the claimant's coal had been diverted to the Tidewater Coal Exchange by order of the Fuel Administrator. Claimant contended that his coal had been requisitioned. In finding that there was not a requisition this Court pointed out that none of the claimant's coal was consumed or appropriated by the Government, there was nothing to indicate that the taking was for public use, and that it was not the Government's purpose to acquire any of the claimant's property.

We agree with the contention of the United States that in the exercise of powers analogous to the police powers of the states it may impose regulations and restrictions on private property for the public welfare, without being liable for just compensation. We do not, however, agree that the Government can promulgate a regulation for the purpose of preempting all of the raw silk in the country for the fulfillment of military needs without being required to pay just compensation. As Mr. Justice Holmes says in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415, 67 L. ed. 322, 326, 43 S. Ct. 158:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Likewise, we say in the instant case that the General Preference Order M-22 was not a regulation for the allocation of raw silk for the public welfare, but was a taking of raw silk for public use within the meaning of the Fifth Amendment.

b. *Deprivation of use of private property may amount to a "taking" without removal of possession or divestment of title.*

It has been argued by the United States that there could not have been a taking by virtue of General Preference Order M-22 because possession of and title to the raw silk was left in the owners until deliveries were made to the Defense Supplies Corporation after October 16, 1941. In answer to this argument we submit that it is a well established doctine supported by numerous decisions that the deprivation of use and enjoyment of property without divestment of title or possession may constitute a taking within the meaning of the Constitution. *United States* v. *General Motors Corp.*, 323 U. S. 373, 89 L. ed. 311, 65 S. Ct. 357; *United States* v. *Welch*, 217 U. S. 333, 54 L. ed. 787; *United States* v. *Lynah*, 188 U. S. 445, 470, 47 L. ed. 539. The Court in *United States* v. *Lynah, supra*, in holding that there was a taking within the constitutional sense states:

> "While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done, it is of little consequence in whom the fee is vested."

The effect of the order of July 26, 1941 was to give virtual control of all raw silk in the country on that date to the Government. No sales of silk were made after July 26, 1941 except in accordance with Government regulations (R. 69). No one but the Government or its contractors

were ever permitted to acquire or consume silk after that date (R. 124). The owners had to maintain their silk in their own possession at their expense and could not consume or deliver it except at the direction of the Government. At no time after July 26, 1941 did the owners exercise or could they have exercised any real right incident to ownership of their property. They could not trade in it because the market was closed. They could not select their buyers because of General Preference Order M-22. They could not fix the price because the Price Administrator announced that he would fix the price and did so. If they had not complied with General Preference Order M-22, the Government under the existing legislation could have seized their plants. If they had refused to hold their silk for the Government they would have been subjected to public censure for impeding the war effort. The only vestige of ownership left with the silk holders after July 26, 1941 was the obligation to pay insurance and storage charges for the silk which they were holding for the Government.

Certainly it would be difficult to find a case better suited than the instant case for the application of the doctrine that deprivation of use of private property constitutes a taking. The silk owners were deprived of the use of their property as a natural consequence of the deliberate, intended exercise of an asserted power of regulating the distribution of raw silk under the guise of a priority order.

c. *Authority for "taking".*

It has also been contended that there could have been no "taking" of the raw silk under General Preference Order M-22 of July 26, 1941 because it was not until the passage of the Requisitioning Act of October 16, 1941, 55 Stat. 742, that there was statutory authority for requisitioning. This contention should be given slight consideration since the principle is well established that the absence of statutory authority is no impediment to a finding that property has been taken by the Government where it is shown that action

in pursuance of a statute not authorizing the requisition of property results in an actual appropriation of property for public use. *United States* v. *Great Falls Manufacturing Company,* 112 U. S. 645, 656, 28 L. ed. 846, 5 S. Ct. 306; *United States* v. *Lynah,* 188 U. S. 445, 465, 47 L. ed. 539.

The United States needs no statutory authority to take property for public use. It can take it under its sovereign right of eminent domain. As Mr. Justice Brewer states in *United States* v. *Lynah, supra:*

> "All private property is held subject to the necessities of the Government. The right of eminent domain underlies all such rights of property:"

It might be added that on July 26, 1941 there was statutory authority for the requisition of plants of persons refusing to comply with priority orders for necessary supplies. Act of June 3, 1916, C. 134, Sec. 120, 39 Stat. 213, 214; Section 9 of the Selective Training and Service Act of September 16, 1940, 54 Stat. 892. Although there was no direct authority by statute to take the raw silk, if the Government had authority to take over the plants of those refusing to comply with orders for raw silk, there was also authority for taking the silk as part of the plant.

3. The forces that were at work subsequent to July 26, 1941, compelled the silk owners to deliver their silk for Government use.

The United States in its cross-petition alleges that there was no "taking" because the cross-respondents had a choice of handing over or of retaining their property. We take exception to such a statement and insist that under the existing circumstances, the silk owners had no alternative but to give the Government their silk.

From a business and economic standpoint, the cross-respondents could not have refused to deliver their silk for Government use. When silk was frozen on July 26, 1941, most of the silk owners had large inventories on hand and

heavy financial obligations to meet. Warehouse, insurance and other charges were piling up. Refusal to deliver would have made it necessary for the owners to borrow long term money with the prospect of financial disaster. (R. 144, 145, 174, 176). Because many of the manufacturers had used only raw silk for their products, they had no established position in the market for substitute fiber (R. 174). The prices of silk in forms other than raw silk were so high that it was impossible to fabricate it so that it could be sold in finished products (R. 176). The throwsters and manufacturers who had used raw silk were at the mercy of the Government which controlled allocation of substitute fibres, and the Government could withhold the special allocation of rayon from hosiery manufacturers who failed to comply with the silk regulation and orders. The silk owners, as business men, could not afford to be exposed to public censure, which was threatened, for refusal to hold their silk for delivery to the Government at the Government's fixed price.

From a patriotic standpoint the silk owners had no choice to accept or to reject orders for delivery for the use of the Government. The tenor of the times and the urgent need for raw silk for defense purposes were compelling factors which must lead to the conclusion that it would have been most unpatriotic, as well as impracticable, for the cross-respondents to have refused to comply with orders for delivery of their silk. Under the existing circumstances, rejection of the orders would have brought down on their heads the reprisals of the Government officials, and refusal to comply with them would have been unthinkable and was not required of the silk owners. "The law, as between the Government and those who deal with it, should be law that is possible to live by, not merely law that reads plausibly in the books." *Winn-Senter Construction Co.* v. *United States*, 75 F. Supp. 255, 260.

4. On and after October 16, 1941, delivery of raw silk for Government use was required.

On October 16, 1941, General Preference Order M-22 was amended to provide that certain orders, including those placed by Defense Supplies Corporation, were assigned a preference rating of A-10 and that acceptance of such orders was *required* (R. 58). The amendment also provided:

> "All of the provisions and definitions of Priorities Regulation No. 1, issued by the Director of Priorities on August 17, 1941, shall be deemed a part of this Order, *except insofar as they are inconsistent herewith.*" (Italics supplied)

Since the amendment reads that acceptance of orders having an A-10 rating "is required" without any further supplementation, it would seem that the provision of Priorities Regulation No. 1, cited in the cross-petition at page 6, with respect to "Defense Orders" that need not be accepted, would be inconsistent with the aforecited excerpt from the Amendment of October 16, 1941. Therefore, the contention set forth at pages 6 and 7 of the cross-petition does not seem to be well taken.

The Court of Claims unanimously held that by the Order of October 16, 1941, the United States took cross-respondents' silk for public use (R. 102). The device it employed for obtaining what it needed was the granting of priority for its own uses and making acceptance of requests to purchase for that use mandatory. The Court states:

> "But to say that when the Government forbids an owner of property to make any other use of it, and requires him to sell it, upon request, to the Government, or its designee who will use it for a Government purpose, is not a taking of the property for public use, would be to make the constitutional right contingent upon the form by which the Government chose to acquire the use of the property." (R. 102).

The Court recognized that the Government did not need to rely on statutory authority to requisition property which it needs for public use.

The silk involved in the instant proceeding was delivered on orders of Defense Supplies Corporation after the amendment of October 16, 1941, which required acceptance of such orders. With the exception of a small portion, all of the silk was delivered on D. S. C. Silk No. 3 form which specifically stated that acceptance was mandatory. The cross-respondents, in maintaining that the Defense Supplies Corporation orders were mandatory and were not voluntary agreements for delivery of their silk, relied on the decision of this Court in *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215, 220, 71 L. ed. 1006, 47 S. Ct. 581, which held that there was a taking of plaintiff's property by eminent domain. In that case the plaintiff had delivered its tobacco products on a Navy order which stated that compliance was obligatory. The Navy Department had issued the order pursuant to Acts of Congress which empowered the President to place an order for war materials and authorized the requisition of property for public use. On the reverse side of the order, reference was made to the Acts of Congress. The United States, in its cross-petition, at page 8, stresses the point that the Defense Supplies Corporation form of order did not refer to any Act of Congress authorizing a requisition, and that for this reason the ruling of this Court in the *Liggett & Myers* case, *supra,* is not applicable. We fail to follow this reasoning. The D. S. C. orders were mandatory, and were issued pursuant to an amendment to General Preference Order M-22 which required acceptance. Furthermore, on October 16, 1941, Congress passed the Requisitioning Act (55 Stat. 742) which expressly authorized the requisitioning of materials needed for defense. Following the thought expressed by Mr. Justice Butler in the *Liggett & Myers* case, *supra,* we say that after October 16, 1941, there was statutory authority to take the raw silk and that it can be presumed that the silk would have been requisitioned if the owners had refused to

comply with the D. S. C. orders. It seems of no importance that the orders under which cross-respondents delivered their property for public use contained no reference to the Order of October 16, 1941 which required acceptance, or to the Act of October 16, 1941 which authorized requisitioning.

5. Summary.

Knowing that all available raw silk would be needed for military purposes, the United States planned to acquire it for those purposes. By the device of freezing the entire supply of silk under the purported authority of allocating necessary commodities in a national emergency, it issued the priority order of July 26, 1941, which deprived the silk owners of the use of their property, and which was a pre-emption of the entire stock of raw silk for public use. For all practical purposes, private ownership of raw silk ended on July 26, 1941, and thereafter the Government controlled the actual custody and delivery of raw silk. As found by the unanimous decision of the Court of Claims, there was a "taking" of cross-respondents' raw silk within the meaning of the Fifth Amendment.

II. The Taking of Cross-Respondents' Raw Silk Did Not Occur Later Than October 16, 1941.

The second issue raised by the cross-petition at pages 9 and 10 is that if there was a taking of cross-respondents' raw silk, the taking did not occur on October 16, 1941, and could not have occurred before December 23, 1941.

The cross-respondents have taken the position that the date of the taking was July 26, 1941. The arguments in support of this position have been fully presented in the brief in support of their petition for a writ of certiorari, beginning at page 56, in Case No. 490, and need not be repeated here.

It is argued in the cross-petition that the mere issuance of the Amendment to General Preference Order M-22 on October 16, 1941 at the most merely authorized the placing of "mandatory orders" each of which would amount to a

"taking", and that until the authority was exercised and the mandatory orders actually placed, there could be no "taking." The United States entirely overlooks the fact that it had exercised its authority over cross-respondents' property before October 16, 1941, and had invaded their rights of ownership beginning on July 26, 1941. Although neither title nor possession passed until the silk was delivered on the D. S. C. orders, this is no impediment to finding that the silk was taken before the placing of the mandatory orders for delivery. Property may be taken long before title passes, and in some instances it has been held that property has been taken when there never is a transfer of title or possession. The legal test of "taking" of property in the constitutional sense is not the passing of title nor physical delivery, but is the deprivation of effective ownership. The time when the taking occurred was the time when effective ownership ceased, which cross-respondents maintain was on July 26, 1941, because all they could do with their property from that time on was to hold it for the Government. The only difference between that date and October 16, 1941, the date of taking fixed by the Court of Claims, is that from the latter date, the owners could merely hold their silk until officially required to deliver it to certain specified Government agents. If, as cross-respondents maintain, they lost their effective ownership on July 26, 1941, they certainly had none on October 16, 1941.

The Government seems to think that October 16, 1941, was not the date of the taking, because the decision to use all of the silk could have been changed. It is sufficient that the order of October 16, 1941 was not changed and that the Government proceeded to take all of the silk under its original plan.

In its withdrawal to successive defense positions, the Government has urged that July 26, 1941 or any time prior to October 16, 1941, could not be the date of taking, because until the Requisitioning Act was passed on October 16, 1941, it had no specific statutory authority to requisition.

It then argues that October 16, 1941, could not be the date of taking, because taking does not depend upon statutory authority for requisitioning, but upon actual delivery. Adoption of such a view would mean that there could be no compensation for handling and storage charges or for interest on the funds invested in silk throughout any period, however protracted, during which an owner of silk was required to hold his property without the right to sell or use it, to report to the Government the amount, kind and situs of his silk holdings, and to await instructions as to its delivery to the one and only possible consumer, the Government. It would certainly be unreasonable and unjust to require the cross-respondents to bear the costs incident to holding of the silk for the government from July 26, 1941, until December 23, 1941, and relieve the United States of liability for such expenditures.

III. There Was a "Taking" of the Raw Silk of Two of the Cross-Respondents Who Delivered Their Silk on D.S.C. Silk No. 1 Form of Order.

In the cross-petition the third point that is argued is that there was no "taking" of 50 bales of silk delivered by Edward P. Stahel & Co., Inc. on December 18, 1941, and 70 bales delivered by Oscar Heineman Corporation on December 15, 1941, because the form of the order which was executed was D. S. C. Silk No. 1, which contained no "mandatory" language such as was contained in D. S. C. Silk No. 3 form.

It is submitted that the Court of Claims has fully and correctly disposed of this question when it said:

> "We think that the fact that two of the plaintiffs executed the form 'D. S. C. Silk No. 1' which did not say that acceptance of the order was required was not important. They did this many weeks after the order of October 16 had been issued, and it was the rule, whether recited on the form or not, that acceptance was required. If they had not executed the No. 1 form they

would, no doubt, within a few days have received the No. 3 form, as the other plaintiffs did, which form expressed the mandatory character of the order." (R. 103).

All silk owners had notice by the amendment to General Preference Order M-22, issued on October 16, 1941, that their silk must be surrendered upon request to holders of a priority rating of A-10, including the Defense Supplies Corporation. Having had this notice, it was unimportant whether form D. S. C. Silk No. 1 or D. S. C. Silk No. 3 was used.

CONCLUSION.

The issues presented by the cross-petition are so closely related to those raised in the petition for a writ of certiorari filed by cross-respondents in Case No. 490 that they can, and should, be considered under the original petition. It is, therefore, respectfully submitted that the cross-petition for a writ of certiorari should be denied.

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